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JACOBS STOTSKY
PLLC

ENVIRONMENTAL LAW.
FROM THE INSIDE OUT.

September 11, 2015

Via Certified Mail – Return Receipt Requested

PHI Service Company
Registered Agent for Pepco Holdings, Inc.
C/o Legal Dept.
800 King Street
Wilmington, Delaware 19801

Joseph M. Rigby, President
Pepco Holdings, Inc.
800 King Street
Wilmington, Delaware 19801

Wesley McNealy, Director
Corporate Environmental Services
Pepco Holdings, Inc.
701 Ninth Street, NW
Washington, DC 20068

CT Corporation System
Registered Agent for Potomac Electric
Power Company
1015 15th Street 10th Floor Washington,
DC 20005

Joseph M. Rigby, President
Potomac Electric Power Company
701 Ninth Street, NW
Washington, DC 20068

Donna Cooper, PEPCO Region President
Potomac Electric Power Company
701 Ninth Street, NW
Washington, DC 20068

**Re: 60-Day Notice of Intent to File Citizen Suit under Clean Water Act for
Violations of Terms and Conditions of District of Columbia NPDES
Individual Permit DC0000094**

To the Individuals and Entities Addressed Above:

I am writing on behalf of the Anacostia Riverkeeper ("Claimant") on behalf of its members and in accordance with Section 505 of the Clean Water Act (the "Act" or the "CWA"), 33 U.S.C. § 1365, 40 C.F.R. Part 135, in regard to violations of the CWA at the Benning Road Generating Station and Service Center Facility (the "Facility" or "PEPCO Facility" or "Site") located at 3400 Benning Road, NE, Washington, DC 20019. The purpose of this letter is to notify the owners and operators of the Facility, namely Wesley McNealy, Potomac Electric Power Company and Pepco Holdings, Inc., individually and d/b/a PEPCO (collectively, "PEPCO"), of ongoing and continuous violations of "an effluent standard or limitation" under Section 505(a)(1)(A) of the CWA, 33 U.S.C. § 1365(a)(1)(A), by failing to comply with the terms and conditions of District of Columbia National

Table 1: NPDES Permit DC0000094 for discharged pollutants at “Outfall 013”

Pollutant	Limit Concentration (ug/L)	
	Average Monthly	Maximum Daily
TSS	30,000	100,000
Copper	5.24	13.44
Lead	56.60	64.58
Zinc	73.11	117.18
Iron	0.69	1.00
NOTES: ¹ Flow, pH, Oil and Grease, PCBs, and WET are not subject to the above concentration limits.		

Review of PEPCO’s Discharge Monitoring Reports (“DMRs”) for Outfall 013 since 2011, from the past 15 reported quarters of DMRs, indicates excursions above both the monthly average and daily maximum permitted limits in every quarterly sample since 2011 for copper (See Table 2, below). Further, for each and every quarter since 2011, at least two or more pollutants were above the threshold of Significant Non Compliance (“SNC”). SNC determinations are based on severity and duration of the violation as calculated by algorithms developed by the EPA (see ECHO data).

The Facility has violated the permitted limit for each and every pollutant listed above and has exceeded the threshold of SNC for nearly every pollutant within the past two years. The Facility has been in SNC status for copper and zinc continuously since 2011, and continues to be in non-compliance through the most recent reporting quarter for copper, iron and zinc. The Facility has been in non-compliance for lead as recently as 2013. These violations are ongoing and continuous for copper, zinc, iron, lead, and TSS.

The specific violations of the permitted limits, as reported in the Discharge Monitoring Reports for Outfall 013, are listed below in Table 2 as the percent exceedance of each permitted limit for the monitoring period:

Table 2: Quarterly Discharge Monitoring Reports of Pollutants at “Outfall 013”

Year	2011		2012				2013				2014				2015
Quarter	3rd	4th	1st	2nd	3rd	4th	1st	2nd	3rd	4th	1st	2nd	3rd	4th	1st
Copper AM	1198	606	339	1446	2763	396	224	740	568	1121	282	1808	224	167	606
Copper MD	406	175	71	503	1016	93	26	227	160	376	49	644	26	4	175
Iron AM	117	2364	146	1219	1233	74	36	59	45	1262	23	364	--	--	175
Iron MD	50	1600	70	810	820	20	--	10	--	840	--	220	--	--	90
Lead AM	--	--	--	112	--	--	--	--	--	15	--	--	--	--	--
Lead MD	--	--	--	86	--	--	--	--	--	1	--	--	--	--	--
TSS AM	13	93	47	140	70	--	--	--	20	467	--	173	--	--	--
TSS MD	--	--	--	--	--	--	--	--	--	70	--	--	--	--	--
Zinc AM	160	256	187	1541	201	187	64	160	119	639	78	297	50	--	133
Zinc MD	62	122	79	924	88	79	2	62	37	361	11	147	--	--	45
<p>NOTES:</p> <p>AM = Average Monthly numeric limit; MD = Maximum Daily numeric limit</p> <p>¹ Numbers expressed as percent in exceedance of permit limits, in violation of the Individual NPDES Permit.</p> <p>² Dashes represent no reported violation.</p>															

The above chart reflects violations of both the average monthly limit, as well as the daily maximum limit of the above pollutants. This means that Outfall 013 exceeded its average monthly limit, and therefore was in violation of its permitted limits for a *minimum* of 1,350 days for copper, 1,260 days for zinc, 1,170 days for iron, 720 for TSS, and 180 days for lead. Further, Outfall 013 exceeded its daily maximum limit, and therefore was in violation of its permitted limits for at least 1,350 days for copper, 1,170 days for zinc, 900 days for iron, 90 days for TSS, and 180 days for lead.

In 2011, PEPCO entered into a Consent Decree (the “Consent Decree”) with DDOE regarding the Facility. The enforcement action by DDOE resulted from six (6) documented releases of PCBs between 1985 and 2003, and was brought pursuant to the Resource Conservation and Recovery Act, and under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607, and under Section 401(a)(2) of the District of Columbia Brownfield Revitalization Act of 2000.

Pursuant to the Consent Decree, PEPCO was required to perform a Remedial Investigation / Feasibility Study, to characterize current environmental degradation at the Facility, as well as investigate whether – and to what extent – past discharges have contributed to contamination of the River. The Consent Decree further requires PEPCO to develop and evaluate cleanup options for those contaminants, and set milestones for these requirements. The agreement includes a Covenant not to Sue, providing assurance that DDOE will not take enforcement action against PEPCO, so long as PEPCO substantially complies with the terms of the agreement.

However, the Consent Decree makes clear that it will not act as a shield from penalties for new violations, and requires the Facility to comply with all applicable laws and regulations. Paragraph 11 of the Consent Decree explicitly states that PEPCO received no relief of any other obligations to comply with environmental laws. It further distinguished the 2011 Consent Decree from governing any outstanding federal, state or local permits.

At present, the Facility continues to exceed its permits and further pollute the very same River with dangerous chemicals. As a result, the past and continuing exceedances of the Individual Permit constitute violations of the CWA.

Legal Claims under the Clean Water Act

The CWA authorizes any citizen to commence a civil action “against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under the chapter.” 33 U.S.C. § 1365(a)(1). The PEPCO Facility has and continues to violate Section 301 of the CWA, 33 U.S.C. § 1311(a), which prohibits “the discharge of any pollutant by any person” except as authorized by a NPDES permit per Section 402 of the CWA. 33 U.S.C. § 1342; see also 33 U.S.C. § 1365(f)(1) (“For purposes of this section, the term ‘effluent standard or limitation under this chapter’ means . . . an unlawful act under subsection (a) of section 1311 of this title.”).

The phrase “discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12)(A). The term “pollutant” includes, without limitation, solid waste, incinerator residue, sewage, garbage, chemical wastes and industrial wastes “discharged into water.” 33 U.S.C. § 1362(6). The term “point source” means “any discernable, confined and discrete conveyance, including but not limited to any pipe . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). The statute defines “navigable waters” as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). Thus, the discharge of pollutants from the pipe at Outfall 013 into the Anacostia River, a water of the United States, is prohibited unless in compliance with a NPDES permit.

Under Part III, Section 3, of the 2009 Individual Permit (“Penalties for Violations of Permit Conditions”), the penalties for violations are explained as follows:

The Clean Water Act provides that any person who violates any permit condition or limitation implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the

Clean Water Act, or any permit condition or limitation implementing of any section, or any requirement imposed in an approved pretreatment program and any person who violates any Order issued by EPA under Section 301(a) of the Act, shall be subject to a civil penalty not to exceed \$27,500 per day for each violation, and to an action for appropriate relief including a permanent or temporary injunction.

Any person who negligently violates Section 301, 302, 306, 307, 308, 318, or 405 of the Clean Water Act, any permit condition or limitation implementing any such section shall be punished by a fine of not less than \$2,500 nor more than \$27,500 per day of such violation, or by imprisonment for not more than 1 year, or by both.

Any person who knowingly violates any permit condition or limitation implementing Section 301, 302, 305, 307, 308, 318, or 405 of the Clean Water Act, shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of such violation or by imprisonment for not more than 3 years, or by both.

Furthermore, the CWA provides that any person who violates a permit condition implementing Sections 301, 302, 306, 307, 308, 318 or 405 of the Act is subject to an administrative penalty not to exceed \$37,500 per day for each violation.

Upon information and belief, and as discussed more fully above, the past and ongoing management practices at the PEPCO Facility have resulted in repeated and ongoing discharges into the Anacostia River, comprising thousands of days of violations of the Individual NPDES Permit.

Notice of Intent to Bring CWA Citizen Suit Litigation

As stated above, this letter serves as Notice to the owners and operators of the PEPCO Benning Road Generating Station and Service Center Facility, located at 3400 Benning Road, NE, Washington, DC 20019, namely, Wesley McNealy, Potomac Electric Power Company and Pepco Holdings, Inc., that pursuant to Section 505(a)(1) of the CWA, 33 U.S.C. § 1365(a)(1), the Anacostia Riverkeeper, on behalf of its members, intends to file a citizen suit against each of the Persons and Entities to whom this letter is addressed as persons responsible for violations of the CWA. Upon information and belief, the Persons and Entities to whom this letter is addressed are the owners, operators, site managers, onsite representatives, and/or registered agents of the entities to whom this letter is addressed and/or the PEPCO Facility.

In particular, the Facility – through its owners, operators, site managers, representatives, and/or agents - has discharged, and continues to discharge, pollutants associated with storm water into the Anacostia River, in violation of the CWA and the Individual NPDES Permit. The organization identified below as Claimant will initiate a citizen suit under the Section 505(a)(1) of the CWA against all of the persons and entities to whom this letter is addressed on, or shortly after, 60 days from the postmark of this notice unless the violations described herein are fully remedied. See 33 U.S.C. § 1365(a)(1).

This letter serves as notice to each of the Persons and Entities to whom this letter is addressed that unless the violations described in this Notice are corrected:

- The Claimant will seek declaratory relief and an injunction prohibiting the ongoing and illegal discharge of pollutants from the Facility in violation of the CWA and the Individual NPDES Permit into the Anacostia River, as well as injunctive relief requiring operation of the Facility in compliance with the terms of the Individual NPDES Permit, state and federal regulations, and the CWA, 33 U.S.C. §§ 1311(a), 1342, and 1365(a).
- The Claimant will also seek declaratory and injunctive relief including, without limitation, an order requiring an environmental assessment to identify the extent of the pollutants discharged into the Anacostia River and their fate; an environmental management system to detect, report, and correct environmental violations; and all other actions necessary to bring the Facility into compliance with the CWA, as well as to abate and remediate any endangerment to human health and the environment. 33 U.S.C. § 1365(a).
- As appropriate, the Claimant will also seek civil penalties and the costs of bringing this litigation, as allowed under the CWA, 33 U.S.C. §§ 1319 and 1365(d).

Persons Giving Notice

This notice is sent on behalf of the following entity:

Anacostia Riverkeeper
Suzanne Kelly, Board Vice Chair
515 M Street, SE, Suite 218
Washington, DC 20003
(202)863-0158

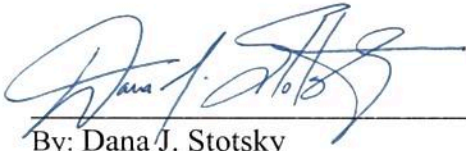
Conclusion

Notice is being provided to you in order to satisfy the requirements of the CWA citizen suit provisions. During this 60-day notice period, the Claimant would like to work cooperatively with you to resolve this matter and address the violations identified in this letter with a cost-effective solution. Our goal is to improve water quality in the Anacostia River and its surrounding areas, and solve the pollution issues at this Facility without the need for costly litigation.

I look forward to speaking with you about how to bring the PEPCO Facility into compliance with its Individual NPDES Permit and the requirements under the CWA. Thank you for your prompt attention to this matter.

Sincerely,

JACOBS STOTSKY PLLC



By: Dana J. Stotsky
1629 K Street, NW, Suite 300
Washington, DC 20006
(202) 417-6750 (office)
(703) 740-7986 (cell)

CERTIFICATE OF SERVICE enclosed
cc (via certified mail, return receipt requested):

Gina McCarthy, Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Mail Code: 1101A
Washington, DC 20460

Shawn Garvin, Administrator
U.S. Environmental Protection Agency, Region 3
1650 Arch Street (3RA00)
Philadelphia, PA 19103

Tommy Wells, Director
District Department of the Environment
1200 First Street, NE
Washington, DC 20002

CERTIFICATE OF SERVICE

The undersigned hereby certifies that an original of the **60-DAY NOTICE OF INTENT TO FILE CITIZEN SUIT** dated September 11, 2015, was sent certified mail, return receipt requested, via U.S. Postal Service, postage prepaid, to

PHI Service Company
Registered Agent for Pepco Holdings, Inc.
C/o Legal Dept.
800 King Street
Wilmington, Delaware 19801

Joseph M. Rigby, President
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PAGE 2

DATE: September 11, 2015

Gina McCarthy, Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Mail Code: 1101A
Washington, DC 20460

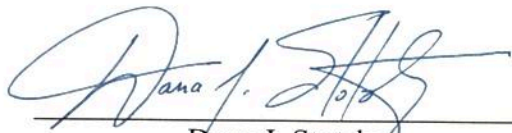
Shawn Garvin, Regional Administrator
U.S. Environmental Protection Agency, Region 3
1650 Arch Street (3RA00)
Philadelphia, PA 19103

and

Tommy Wells, Director
District Department of the Environment
1200 First Street, NE
Washington, DC 20002

Date: September 11, 2015

By:



Dana J. Stotsky

